

1  
2  
3  
4  
5  
6  
7  
8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11                  ETIENNE L. CHOQUETTE,

12                  v.  
13                  Plaintiff,

14                  BERNARD E. WARNER, et al.,

15  
16                  Defendants.

17                  CASE NO. 3:15-cv-05838-BHS-JRC

18                  ORDER DENYING MOTIONS TO  
19                  EXCLUDE AND MOTION TO  
20                  STRIKE

21                  The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States  
22                  Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local  
23                  Magistrate Judge Rules MJR1, MJR3 and MJR4.

24                  Plaintiff filed this § 1983 action alleging deliberate indifference in his medical care.  
25                  After defendants filed a motion for summary judgment, plaintiff filed three motions to exclude  
26                  the testimony of three potential defense witnesses. Defendants then moved to strike several  
27                  portions of declarations filed by plaintiff. However, plaintiff's motions do not adhere to the  
28                  Court's Local Rules, which require that the motions to strike be made within the confines of the  
29  
30

1 responsive pleadings -- the Court therefore denies them. The Court denies defendants' motions to  
2 strike because the information defendants object to, though presented in an inadmissible form,  
3 would be admissible at trial.

4 **BACKGROUND**

5 After defendants moved for summary judgment (Dkt. 82), plaintiff filed three motions to  
6 exclude testimony, seeking to exclude both the declarations and expert testimony of three  
7 potential defense witnesses (Dkts. 93, 94, 96). Defendants responded to these motions, arguing  
8 only that these motions should be denied because they violated the Local Rules. Dkts. 101, 102,  
9 103. In defendants' reply to plaintiff's response, defendants included a motion to strike. Dkt. 97  
10 at 2-3. Pursuant to court order, counsel for the parties appeared at oral argument on December 7,  
11 2017, and presented on both the motion for summary judgment and the motions to exclude.

12 **DISCUSSION**

13 Plaintiff first challenges the expert testimony of several witnesses, moving to exclude  
14 their testimony. Dkts. 93, 94, 96.<sup>1</sup>

15 Defendants argue that plaintiff's motions to exclude were filed in violation of Local Rule  
16 7(g), which provides, in part:

17 Requests to strike material contained in or attached to submissions of opposing parties  
18 shall not be presented in a separate motion to strike, but shall instead be included in the  
19 responsive brief, and will be considered with the underlying motion.  
20 . . .

21 Defendants also argued at oral argument that, even if the Court interprets this as a motion  
22 in limine, it is in violation of Local Rule 7(d)(4), which provides:  
23

---

24 <sup>1</sup> The Court is considering these motions only in relation to its Report and  
Recommendation on the motion for summary judgment. The District Court Judge will rule on  
the admissibility of these opinions at trial.

1                   (4) *Motions in Limine*. Except upon a showing of good cause, any motions in limine  
2 shall be filed as one motion and shall be noted for consideration no earlier than the  
3 third Friday after filing and service of the motion but no later than the Friday before  
4 any scheduled pretrial conference. Any opposition papers shall be filed and served no  
5 later than the Monday before the noting date. No reply papers shall be filed.

6                   The Court agrees with defendants. Though the Court does not abandon its gatekeeping  
7 duties regarding admissibility of evidence, plaintiff presented these motions in separate  
8 documents, after exhausting the page limits of his response to the summary judgment motion,  
9 which is prohibited under LR 7(g). And he has not presented his objections in a form recognized  
10 by the local rules as a motion in limine in conformity with the requirements of LR 7(d)(4) or the  
11 Federal Rules of Civil Procedure. Therefore, the Court denies these motions.

12                  Defendants also move to strike particular portions of the Heller and Cartwright  
13 declarations. As noted above, at the summary judgment stage, the Court does not look at the  
14 admissibility of the form of evidence, but whether it could be presented at trial in an admissible  
15 form. *Fraser*, 342 F.3d at 1037. Defendants object that plaintiff's Heller declaration contains  
16 improper expert testimony because he allegedly opines about the role of pharmacists in the  
17 prescription of medication even though he himself is a medical doctor, not a pharmacist. Dkts. 97  
18 at 2-3; 92 at 3-4. However, even if this testimony requires the expert testimony of a pharmacist  
19 rather than a medical doctor, such an expert could be presented at trial and his or her testimony  
20 would be admissible. Defendants also object that plaintiff's Cartwright declaration contains  
21 hearsay. Dkt. 97 at 2-3. However, the alleged hearsay statements could be presented by the  
22 declarants themselves at trial, and would therefore be similarly admissible. See *Fraser*, 342 F.3d  
23 at 1036-37; *Evnas v. USF Reddaway, Inc.*, 2017 WL 2837136 at \*3 (D. Idaho 2017). The Court  
24 finds the evidence even if presented in an inadmissible form, could be presented in an admissible  
form at trial. Defendants' motion to strike is therefore denied.

## CONCLUSION

For the reasons stated above, the Court denies plaintiff's motions to exclude (Dkt. 93, 94, 96) and defendants' motion to strike (Dkt. 97 at 2-3).

Dated this 12th day of December, 2017.

J. K. Ward Creative

J. Richard Creatura  
United States Magistrate Judge